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ABSTRACT

Recent litigation under section 504 of the Rehabilitation Act of 1973 and unresolved issues in the application of section 504 to colleges and universities are examined. Section 504 is a federal statute expressing a national commitment to end discrimination against individuals on the basis of handicap. Three issues that currently confound efficient implementation of section 504 are as follows: (1) the meaning of "otherwise qualified" in the statutory text; (2) whether and to what extent affirmative steps must be taken by recipients of federal financial assistance to permit handicapped persons to participate in programs; and (3) whether section 504 applies only to those individual programs or activities that benefit directly from federal financial assistance, or to all programs and activities of an institution that receives federal financial assistance for any of its programs or activities. "Qualified handicapped person" is defined by the implementing regulations for section 504 as "a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipients' education program or activity." The courts have not reached agreement on a standard for institutions to follow regarding accommodations for the handicapped. For the most part, institutions must rely on their own good-faith interpretations of the regulation in deciding whether an accommodation is required. Procedural issues regarding section 504 and the courts include: the students' private right of action against the university under the statute; whether damages are available under section 504; and whether section 504 forbids use of procedures or criteria that may unintentionally discriminate against handicapped persons. (SW)

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Legal Issues Surrounding Section 504

by HOWARD GRIFFIN

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This article examines recent litigation under section 504 of the Rehabilitation Act of 1973 and currently unresolved issues in the application of section 504 to colleges and universities.

Section 504 is a federal statute expressing a national commitment to end discrimination against individuals on the basis of handicap. The law provides that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . ." On May 4, 1977, the Department of Health, Education and Welfare (HEW) promulgated a regulation implementing section 504. Subpart E of the regulation is addressed to postsecondary education, prohibiting discrimination against qualified handicapped persons in recruitment, admission, and treatment after admission. Colleges and universities are required to make federally assisted programs accessible to handicapped students and to insure that qualified handicapped persons are not effectively excluded from such programs by the absence of auxiliary aids.

Section 504 was passed by Congress in 1973 and was amended in 1974 and 1978 without much argument or debate. No congressional hearings were held or committee reports prepared that would suggest how section 504 is to be interpreted or applied. Since the statute's length is only one line, colleges and the courts must look to analogous provisions of law for help in resolving some of the more difficult substantive and procedural questions raised by section 504 and the implementing rules.

Two federal nondiscrimination laws have language nearly identical to the text of section 504: Title VI of the Civil Rights Act of 1964, which prohibits race and national origin discrimination in all federally assisted programs and activities, and Title IX of the Education Amendments of 1972, which bars sex discrimination in education programs that receive federal funds. The 1978 amendments to the Rehabilitation Act specifically incorporate the Title VI remedies and procedures in section 504. The Supreme Court has said in one case that Title IX should be interpreted consistently with Title VI. This means that the legislative history and case law developed under both earlier statutes may be relevant in determining how section 504 should be applied.

Substantive Issues

Three issues currently confound efficient implementation of section 504: 1) the meaning of "otherwise qualified" in the statutory text, 2) whether and to what extent affirmative steps must be taken by recipients of federal financial assistance to permit handicapped persons to participate in programs, and 3) whether section 504 applies only to those individual programs or activities that benefit directly from federal financial assistance, or to *all* programs and activities of an institution that receives federal financial assistance for *any* of its programs or activities.

Who is an "otherwise qualified" handicapped person?

For purposes of participation in postsecondary education programs, "qualified handicapped person" is defined by the implementing regulations for section 504 as "a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipients' education program or activity. . . ." Confusion arose around the phrase "otherwise qualified" and was resolved by the U.S. Supreme Court in *Southeastern Community College v Davis* 442 U.S. 387 (1979). In *Davis*, the Supreme Court considered the case of a hearing-impaired applicant to the federally assisted nursing program of a state institution. Because of the applicant's hearing impairment, admissions officials deemed her to be unqualified for nursing study and denied her application. The applicant brought suit under section 504 alleging unlawful discrimination on the basis of handicap. The district court concluded that the applicant was not an "otherwise qualified handicapped individual" protected against discrimination by section 504. The court said that "otherwise qualified can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." In the court's view, the applicant's hearing disability would have prevented her from functioning sufficiently in the nursing program, and therefore the institution's refusal to admit her was not illegal under section 504.

The U.S. Court of Appeals, Fourth Circuit, reversed this decision, stating

that the district court had misconstrued section 504. The court of appeals indicated that the phrase "otherwise qualified handicapped individual" referred to an individual who would be qualified for a program without regard to handicap. Therefore, persons protected by section 504 would include those able to meet the requirement of a particular program in every respect except as to the limitations imposed by their handicap. The appeals court concluded that the district court erred in taking the applicant's handicap into account in determining whether she was "otherwise qualified" for the nursing program.

The Supreme Court, citing the "plain meaning" of the statute, reversed the decision of the court of appeals and affirmed the district court's construction of the words "otherwise qualified." The Supreme Court ruled that "an otherwise qualified person is one who is able to meet all of a program's requirements *in spite of his handicap*." The Court cited with approval the implementing regulation that requires handicapped applicants to meet a program's academic and technical standards, which may include legitimate physical qualifications essential to participation in the program.

Simply because the Supreme Court has chosen between two abstract conceptions of the meaning of "otherwise qualified" does not mean that the determination of who is an "otherwise qualified handicapped person" is now a simple matter. The Court's decision allows a college or university to take into consideration an applicant's handicap in determining whether the applicant is "otherwise qualified" for participation in an academic program. If an applicant can participate successfully in the program in spite of his or her handicap, the college or university may not block participation solely on the basis of the individual's handicap. However, if an applicant's disability will prevent successful participation in the program, the institution may legally deny the applicant an opportunity to participate.

Proving that a handicap bars successful participation can be difficult, and denials of admission on this basis may lead to litigation. A good example is the recent U.S. Court of Appeals, Second Circuit, case of *Doe v. New York University* No. 81-7680 (1981), in which a medical student at New York University was denied readmission because of previously undisclosed psychological and emotional problems that manifested in violent and self-destructive behavior. School officials determined that these emotional problems rendered Doe unable to participate in the medical school's program because of the dangers her behavior posed both to herself and to others. In *Doe* the critical factual issue was the degree of risk that the student's mental disturbances would recur were she to be readmitted to the program, and voluminous and conflicting evidence from psychiatric experts was presented.

The district court adopted the test that the student must be deemed qualified if it appeared "more likely than not" that she could complete her medical training and serve as a physician without recurrence of self-destructive and anti-social conduct. The court of appeals disagreed, stating that the student "would not be qualified for readmission if there is a 'significant' risk of . . . recurrence." The appeals court concluded that the record in the case showed a significant risk of recurrence and, therefore, that the student was not an "otherwise qualified handicapped individual" protected under section 504.

What steps, if any, must an institution take to accommodate handicapped persons?

Section 504 is a broad statute designed to address handicap discrimination in a variety of programs and activities receiving federal financial assistance. It thus covers not only academic programs at recipient colleges and universities, but federally assisted public transportation and broadcasting activities as well. The regulations require institutions to "make reasonable accommodation(s)" to the known handicaps of applicants and employees. Currently, this "reasonable accommodation" requirement applies only in the context of employment practices; a different approach is taken for academic programs of recipient institutions.

Under section 504 an institution's academic programs, when viewed as a whole, must be accessible to handicapped persons. The regulation requires institutions to make such modifications to academic requirements as are necessary to insure that such requirements do not discriminate against handicapped individuals. The regulation does not require institutions to modify requirements that can be shown to be "essential to the program of instruction . . . or to any directly related licensing requirement. . . ."

In *Davis*, an applicant to the institution's nursing program argued that the school was required to undertake such changes on her behalf as would dispense with the need for effective oral communication in the program. The Supreme Court held that the extent of the modifications necessary to permit the applicant to participate would be far in excess of the "modification" the regulations require. The Court said:

> Moreover, an interpretation of the regulations that required the extensive modification necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs, beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of Section 504. Instead, they would constitute an unauthorized extension of the obligation imposed by that statute.

The Supreme Court recognized that the line between a lawful refusal to make an unreasonable modification and illegal discrimination against handicapped persons is difficult to draw. The Court stated that there are instances when mere neutrality would be discriminatory, requiring positive steps to assure nondiscrimination. At the same time, the Court held that section 504 does not require "affirmative action."

Since *Davis*, a number of lower courts have tried to distinguish between affirmative action and nondiscrimination and have reached widely varying conclusions.

For example, in *American Public Transit Association v. Lewis* No. 79-1697 (1981), U.S. Court of Appeals, District of Columbia Circuit, interpreted *Davis* as holding that federal agencies may not impose onerous burdens, under section 504, on local transportation programs. In *Lewis*, the issue was whether the Department of Transportation (DOT) could require every mode of transportation in a mass transit system to be made accessible to the handicapped (DOT had issued regulations requiring complete accessibility). The court of appeals, noting that compliance with the regulations would be extraordinarily expensive, held that section 504 does not mandate extensive modifications that would impose extreme financial burdens on local transit authorities. The court, citing the *Davis* holding, said that "neither

the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." The court also spoke of a line between impermissible discrimination and *optional* affirmative action and noted that "at some point a transit system's refusal to take modest, affirmative steps to accommodate handicapped persons might well violate Section 504."

In the view of the District of Columbia Court of Appeals, then, it appears that the *Davis* opinion requires only minimal effort on the part of recipients of federal assistance to modify programs to accommodate handicapped individuals, and perhaps may not authorize mandatory accommodations at all. This view is consistent with the holding in another transportation case, *Dopico* v. *Goldschmidt* 50 U.S.L.W. 2062 (1981). In *Dopico*, the U.S. District Court for the Southern District of New York held *Davis* to mean that section 504 does not require a local transportation agency to make "massive expenditures" to render mass transportation systems accessible to handicapped persons. The court said the substantive right under section 504 is limited by that modifications involving substantial sums are not required.

The "transportation cases" seem to be characterized by use of a "financial burdensomeness" test for gauging the extent of accommodation required by section 504. Certain cases in the public broadcasting area appear to reject this test. In *Greater Los Angeles Council on Deafness* v. *Community T.V. of Southern California* No. 78-4715 (1978), the U.S. District Court for the Central District of California held that public television stations must make their programming accessible to hearing-impaired viewers without regard to the cost of such accommodation. A circuit court appeal was dismissed. Similarly, without referring to the costs associated with providing such accessibility, the U.S. Court of Appeals for the District of Columbia in *Gottfried* v. *Federal Communications Commission* No. 79-1722 (1981) required FCC to consider accessibility of programming to hearing-impaired viewers as part of FCC's obligation to make "public-interest" determinations in evaluating license-renewal applications.

The only case (other than *Davis*) in which the accommodation issue was presented in the context of a university's academic program was *Camenisch* v. *University of Texas* 616 F.2d 127 (1980). *Camenisch* considered whether the University of Texas was responsible under section 504 for paying for a deaf student's sign-language interpreter. The opinion of the U.S. Court of Appeals, Fifth Circuit, was nullified by the Supreme Court on esoteric procedural grounds, leaving the issue in *Camenisch* unresolved.

The courts have not reached agreement on a standard for institutions to follow regarding accommodations for handicapped persons. For the most part, institutions must rely on their own good-faith interpretations of the regulation in deciding whether an accommodation is required. Financial burdensomeness has been used as a test in transportation cases but ignored in broadcasting cases. In *Davis*, the Supreme Court affirmed only that initial responsibility for interpreting section 504 rests with the appropriate federal enforcement agency:

> Situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of [HHS, ED, Dept. of Justice].

Is the application of section 504 to federally assisted institutions of higher education "program specific"? Section 504, by its terms, applies to "any program or activity receiving federal financial assistance." Under a "program-specific" approach, this language would be understood to restrict the applicability of section 504 to those individual educational programs or activities that directly receive federal financial assistance. An alternative reading of the statute, and the one pressed by the federal government until the change in administrations, is that every program or activity at an institution is covered as long as that institution receives federal financial assistance for some of its programs or activities. This view is based on the idea of indirect benefit from federal financial assistance that assistance to some of an institution's programs or activities ultimately benefits all of its programs or activities.

The "program-specific" issue has surfaced most frequently with respect to the sex discrimination provisions of Title IX of the Education Amendments of 1972. Title IX prohibits sex discrimination in any "educational program or activity receiving federal assistance." This phrase has been interpreted differently by several federal courts. For example, the U.S. Court of Appeals, First Circuit, in *Rice* v. *President and Fellows of Harvard College* 59 U.S.L.W. 2295 (1981), held that discrimination must be alleged in a specific federally funded program for Title IX to apply, but the U.S. District Court for the Eastern District of Pennsylvania reached the opposite conclusion in *Haffer* v. *Temple University* 50 U.S.L.W. 2246 (1981).

In a brief filed recently before the Supreme Court (*North Haven Board of Education* v. *Bell* No. 80-986), the Department of Justice took the position that Title IX is program specific (although program specificity is not the central issue in the case). The same point of view was expressed in a brief filed in *University of Richmond* v. *Bell*, a case raising the question in the context of the application of Title IX to a university athletic program. If the federal courts accept the government's argument and rule that Title IX is program specific, it is likely that the same principle will be applied to section 504. If so, institutions will be subject to section 504 only with respect to those programs that are recipients of federal financial assistance. For example, receipt of federal aid by the medical school would not in itself cause athletic programs to be covered. Resolution of this point may be of limited effect, however, as long as student grants and veterans benefits are defined to be institutional as well as individual assistance. Arguably, most programs are direct recipients of student aid through general operating funds.

At least one federal district court has ruled that section 504 is not program specific. In *Wright* v. *Columbia University* 520 F.Supp. 789 (1981), the university refused to allow a student to participate in intercollegiate football because he had lost the sight in one of his eyes. The university defended against the student's section 504 suit in part by arguing that section 504 was not applicable to its intercollegiate athletic program since that program received no direct federal financial aid. The U.S. District Court for Eastern District of Pennsylvania did not accept this argument and held that when a university receives federal assistance, all of its programs benefit indirectly because the university is freed from certain financial obligations by the federal assistance and may direct those funds to other programs. As it is binding only in eastern Pennsylvania, the de-

cision is of limited value as a precedent. Future decisions on this issue under section 504 may be as inconsistent as they have been under Title IX.

The issue of program specificity under section 504 was raised in *Camenisch*: the university argued that the plaintiff had to show that financial assistance received by the institution was intended to support the particular program in which the plaintiff was enrolled. Because of procedural problems in the case, the issue was never resolved, although it may be addressed by the district court when the case is tried on the merits.

Procedural Issues

Several procedural issues confound smooth administration of section 504 by the courts. The following hypothetical cases illustrate those problems in the order in which they would be expected to occur.

A handicapped student believes that he has been discriminated against by a university on the basis of his handicap. It is not contested that he is protected from the alleged discrimination by section 504 of the Rehabilitation Act. The student writes a letter to the Department of Education complaining of the alleged discrimination and then decides to file his own lawsuit. This presents the first procedural hurdle: can the student bring a private lawsuit (i.e., a private right of action), or must he be content with whatever administrative action is taken by ED against the university?

Section 504 contains no provision explicitly establishing a private cause of action, though Title IX, on which section 504 is modeled, was interpreted by the Supreme Court, in *Cannon* v. *University of Chicago* 441 U.S. 677 (1980), as doing so. Under the interpretation-by-analogy reasoning described earlier, it can be expected that courts will interpret section 504 similarly.

Assuming that the student is deemed to have a private right of action against the university under the statute, it is still not certain that he may proceed with his lawsuit. The student must consider whether to exhaust his administrative remedies, i.e., to use every internal mechanism available at the university for redress of his grievance and every mechanism available through the Department of Education. It is uncertain whether an aggrieved handicapped individual must exhaust all administrative remedial alternatives before he may file his own suit in federal court. At least three U.S. courts of appeals have held that exhaustion is not required. The tenth circuit so held in *Pushkin* v. *Regents of the University of Colorado* 50 U.S.L.W. 2182 (1981), wherein the court noted that an administrative examination of the practices of a recipient of federal assistance may lead to a suspension or termination of the federal assistance but that such relief would not include or encompass equitable relief for the affected individual. In *Miener* v. *Missouri* 50 U.S.L.W. 2474 (1982), the court said that exhaustion of administrative remedies would be futile and therefore is not a prerequisite to a federal court suit under section 504.

The hypothetical student, having persuaded a court that his lawsuit is proper, sues the university to obtain a court order mandating that the university accommodate him and asks $1 million as compensation for the pecuniary loss he believes he suffered due to the university's alleged discrimination. The student's claim for the money is known as a claim for "damages"; his request for a court order mandating accommodation is known as "injunctive relief." The issue in the hypothetical is whether damages are available at all under section 504, even though the student may in fact have suffered a pecuniary loss of $1 million.

The federal courts are now split. In *Miener*, the court held that since the administrative remedies were inadequate, a plaintiff may recover damages under section 504. However, the U.S. District Court for the Southern District of New York in *Patton* v. *Dumpson* 489 F.Supp. 933 (1980), reached the opposite conclusion. Guidance (once again via the Title IX —section 504 analogy) may come from a Title IX case, *Lieberman* v. *University of Chicago* 660 F.2d 1185 (1981). The U.S. Court of Appeals, Seventh Circuit held that no damages were available under Title IX, and the Supreme Court has been asked to review the case.

A final procedural issue concerns whether section 504 forbids use of procedures or criteria that, while apparently innocuous, effectively discriminate against handicapped persons (i.e., does section 504 forbid only those practices that are *intentionally* discriminatory?). The following example illustrates the issue.

A 39-year-old female applies for admission to a university medical school. The admissions policy of the medical school disfavors applicants over age 30 because of the length of time required for medical training. The applicant is rejected by the medical school on the basis of her Medical College Aptitude Test scores, her undergraduate grade-point average, and her age. Alleging sex discrimination, she brings suit under Title IX and argues as follows:

> Because women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than do men, the age policies in this case disparately affect women and therefore result in sex discrimination in violation of Title IX.

The applicant's argument is that, although the medical school does not intend to discriminate on the basis of sex, its policies—facially neutral with regard to sex—effectively discriminate against women.

The facts above were presented to the U.S. Court of Appeals, Seventh Circuit, in *Cannon* v. *University of Chicago* (Cannon II) 26 EPD ¶31,822 (1981). In *Cannon*, the court determined that, in order to establish a violation of Title IX, an intentionally discriminatory act (i.e., a purpose to discriminate on the basis of sex) must be shown. Since the university's age policies were only incidentally discriminatory, no violation of Title IX was presented. The Supreme Court denied a petition to hear the case.

The issue of disparate impact versus intent under Title VI is now before the Supreme Court in *Guardians Association* v. *Civil Service Commission of the City of New York* 633 F.2d 232 (1981). In *Guardians*, the U.S. Court of Appeals, Second Circuit, held that showing a racially discriminatory purpose is required in order to establish a violation of Title VI. The decision of the Supreme Court in this case will be significant for construction of section 504 because of the analogy that can be drawn between section 504 and Titles VI and IX. Affirmation of the court of appeals decision in *Guardians*, especially when considered with the denial of review in *Cannon*, would militate strongly in favor of an intent requirement under section 504. ♦

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